

STATE OF MICHIGAN
COURT OF APPEALS

BARRY K. RIDDICK,

Plaintiff-Appellant,

v

ELLIS B. FREATMAN and ROBERTS &
FREATMAN,

Defendants-Appellees.

UNPUBLISHED

May 25, 1999

No. 201231

Washtenaw Circuit Court

LC No. 96-3677-NO

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Summary disposition was granted in favor of defendants on plaintiff's claims of legal malpractice¹, and defendants were awarded sanctions. Plaintiff appeals by leave granted², and we affirm.

In 1988 defendant Freatman was retained by plaintiff and his family to defend plaintiff against a charge of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)92)(1)(iv). A supplemental information was later filed against plaintiff, alleging that he was a third or subsequent felony offender, MCL 769.11; MSA 28.1083. Plaintiff was convicted of the delivery charge in December 1988 and subsequently, pleaded guilty to the habitual offender charge. He was sentenced in January 1989 as an habitual offender to eight to forty years' imprisonment.

In March 1989, plaintiff filed a grievance with the Attorney Grievance Commission, alleging that defendant Freatman failed to move to suppress certain evidence at trial. He also complained that the trial court's acceptance of his plea to the habitual offender charge was "inaccurately accepted by the trial judge" and that defendant Freatman knew he was reluctant to plead to that charge. In his response to the grievance, Freatman, among other things, indicated that plaintiff seemed to be arguing that his two prior convictions, upon which the supplemental information was based, should have been set aside or expunged.

In addition to filing a grievance, plaintiff appealed his conviction as of right, which conviction was upheld by this Court in 1991. *People v Riddick*, unpublished opinion per curiam of the Court of

Appeals, issued July 30, 1991 (Docket No. 118090). In upholding his conviction, this court stated that "[d]efendant further claims that the sentences imposed for his two previous felonies were invalid, so that his conviction as an habitual offender was improper. This claim is without merit." *Id.*

In 1995, plaintiff filed a motion for a *Tucker*³ hearing in the trial court, alleging that his sentence was improper where one of the prior convictions used to establish his habitual offender status was invalid and constitutionally infirm⁴. On December 22, 1995, the trial court denied plaintiff's motion, ruling that because plaintiff was represented by counsel when the plea in the prior case was taken, he was not entitled to a *Tucker* hearing. Also, the trial court indicated that a defective conviction contained in an habitual offender information can only be challenged if the defendant files a motion to quash prior to the entry of a plea on the habitual offender charge, and that, in any event, pursuant to *People v Ingram*, 439 Mich 288, 296; 484 NW2d 241 (1992), only convictions taken without the benefit of counsel are subject to collateral attack.

On September 24, 1996, defendant filed his complaint in this case, which primarily asserts that defendant Freatman was negligent in handling the habitual offender charge and failing to timely and adequately attack the underlying convictions on which it was based. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the applicable statute of limitations barred plaintiff's claims. Defendants also requested sanctions. The trial court granted defendants' motion, dismissed the complaint, and assessed sanctions in the amount of \$1,000 in attorney fees and \$20 in court costs.

Plaintiff argues that his claims were not barred by the applicable statute of limitations. We disagree. An action for malpractice may be commenced at any time within two years of the date the action accrues, MCL 600.5805(4); MSA 27A.5805(4), or within six months after plaintiff discovers or should have discovered the existence of the claim, whichever is later, MCL 600.5838(2); MSA 27A.5838(2). An action "accrues" on the last date of the attorney's service to the defendant. *Fante v Stepek*, 219 Mich App 319, 322; 556 NW2d 168 (1996). In this case, it is undisputed that defendant Freatman did not serve as plaintiff's attorney within two years of September 24, 1996. The last date of service was apparently the date of sentencing in January 1989.⁵ Plaintiff therefore relies on the "discovery" rule and argues that he filed suit within six months of discovering the existence of his claim.

In his affidavit in opposition to summary disposition, plaintiff stated:

Within the course of preparing the Application for Leave to Appeal the Court's Order [the trial court's December 22, 1995 order denying plaintiff's motion for a *Tucker* hearing], I discovered on July 20, 1996, that legal malpractice/negligence, breach of contract, fraud and deceit may have occurred.

Plaintiff utilizes the July 20, 1996 date to start the six month period within which he had to file suit.

Under the discovery rule, the six month time period begins to run when a plaintiff discovers that he has a "possible" cause of action. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). Once an injury and its possible causes are known, the plaintiff is aware of a possible cause of

action. *Gebhardt, supra*, 444 Mich 545, citing *Moll v Abbot Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). It is not necessary that a plaintiff know of a “likely” cause of action. *Gebhardt, supra*. In this case, plaintiff’s alleged injury is his augmented sentence, which was enhanced because of the habitual offender information. He knew of the sentence on January 26, 1989 when it was imposed. With regard to the possible cause of that “injury” we find that, at the very latest, by the fall of 1995 when plaintiff moved for a *Tucker* hearing, he knew or believed that defendant Freatman had made errors related to the supplemental information, which errors resulted in his being forced to plead guilty to the habitual offender charge and have an augmented sentence imposed.⁶ Thus, plaintiff knew of his injury and its possible causes no later than the time he moved for the *Tucker* hearing. Plaintiff’s argument that he did not know of his cause of action until he was doing legal research is disingenuous. While plaintiff may not have determined the exact nature of the claims he was going to allege against defendants until that time, he clearly knew of his injury and its possible causes well in advance of six months prior to the filing of his complaint.

Plaintiff next claims the trial court improperly assessed sanctions. Plaintiff challenges the decision to award sanctions, claiming that the trial court failed to properly set forth the reasons for finding that his claim was frivolous. He also contests the amount of sanctions assessed because there was no documentation to determine how the \$1,000 fee was calculated. In addition, he argues that he was not afforded rudimentary due process where the trial court did not determine his ability to pay.

Sanctions may be imposed under MCR 2.114(E) if the trial court finds that an attorney or party signed a document in violation of MCR 2.114. This rule imposes an affirmative duty on attorneys or parties to conduct *a reasonable inquiry into the factual and legal viability of a pleading* before it is signed. See *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 678 (1993)(emphasis added). The “reasonable inquiry” test is objective. *Id.* We disagree with plaintiff’s argument that the trial court erred in finding the action frivolous and that it erred because it failed to refer to facts that would support its conclusion that reasonable minds could not differ about the merits of the complaint. The trial court clearly indicated that there was no factual basis for arguing that the claim was timely, and thus it had no merit and was frivolous. The trial court’s decision was not clearly erroneous. *Maryland Casualty Co v Allen*, 221 Mich App 26, 33; 561 NW2d 103 (1997). The uncontroverted facts in this case were sufficient to support the court’s conclusion that the pleading was frivolous and sanctions were warranted.

We also note that the outcome does not change simply because plaintiff represented himself. MCR 2.114(E) allows for the imposition of sanctions upon unrepresented parties. *People v Herrera (On Remand)*, 204 Mich App 333, 338; 514 NW2d 543 (1994).

We also find no reversible error with regard to the amount of the fees awarded. There is no precise formula for computing the reasonableness of an attorney’s fee. See *J C Building Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 430; 552 NW2d 456 (1996). A number of factors may be taken into consideration, including but not limited to the attorney’s professional standing and experience; the skill, time, and labor involved; the amount in question and results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the relationship with the client. *Id.* In the present case, defense counsel asserted that \$1,000 would be a reasonable fee, and the trial court

agreed. Although we would have preferred a greater explication, we are not prepared to find that the trial court abused its discretion in awarding that sum.

We also do not agree with plaintiff's contention that he was not afforded rudimentary due process under *Herrera, supra* because the trial court did not determine his ability to pay. In *Herrera, supra* at 339, the Court discussed the award of sanctions against pro se prisoner litigants in the context of their ability to assert "constitutionally protected liberty interests" and determined that due process included a determination of ability to pay. In this case, plaintiff was not attempting to assert constitutionally protected liberty interests by filing his frivolous civil pleading, and thus, there is no requirement that the trial court assess his ability to pay before imposing sanctions.

Affirmed.

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ Harold Hood

¹ Plaintiff's complaint alleged three separate counts entitled "legal malpractice", "fraud and deceit", and "breach of contract", but, in reality, all of the counts relate to the alleged malpractice of defendant Freatman in representing plaintiff in a criminal matter. The trial court treated the action as a legal malpractice claim only. Plaintiff does not dispute this on appeal.

² Although plaintiff filed an application for leave to appeal the order of summary disposition and imposition of sanctions, we note that plaintiff had an appeal as of right from that order and did not need to file an application for leave. Nevertheless, this Court granted his application.

³ *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972).

⁴ This Court was not presented with a copy of the motion requesting the *Tucker* hearing. Therefore, we are unable to determine whether plaintiff attempted to collaterally attack both of the prior convictions upon which the supplemental information was based. It appears from the trial court's order denying plaintiff's motion for a *Tucker* hearing that plaintiff only challenged one of the convictions. We also note that because we have not been presented with a copy of the motion, we are also unable to determine on what basis plaintiff challenged the prior conviction.

⁵ Between the time of plaintiff's sentence in January 1989 and April 1, 1994, the limitations period was tolled by plaintiff's imprisonment. See *Johnson v Marks*, 224 Mich App 356, 357; 568 NW2d 689 (1997). Plaintiff only had until April 1, 1995 to file a malpractice action unless the discovery rule applies. *Id.*; MCL 600.5851(9); MSA 27A.5851(9).

⁶ We are mindful of the arguments that defendants made below that plaintiff knew of the possible cause of action as early as March 1989 when he filed his grievance and certainly no later than 1991 when this Court, in deciding to uphold his conviction, addressed the issue of whether the sentences for the two previous felonies were invalid. We agree that defendant probably knew of his injury and possible cause of action earlier than 1995.